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CHARLES ELMORE CROPLEY

No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1944

ON PETITION FOR WRIT OF CERTIORARI TO THE [illegible] STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 143

MOE HENRY HANKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 218–222) is reported in 50 F. Supp. 996. The opinion of the circuit court of appeals (R. 229–232; Pet. 13–17) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on March 22, 1944 (R. 232–233). The petition for a writ of certiorari was filed on June 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in determining the enhancement value of a tenant's growing crops destroyed in taking possession of condemned land, it is improper to consider the market value of similar crops six months after maturity.

2. Whether the cost of planting grass as required by a lease is a proper matter for consideration in awarding just compensation for the lessee's interest.

STATEMENT

This case arose from condemnation proceedings instituted by the United States to acquire 576 acres of land in Montgomery County, Pennsylvania, for use as a Navy airport (R. 4–21). A declaration of taking was filed on March 23, 1942 (R. 23–25), and the United States took immediate possession (R. 28). One of the tracts so taken was a farm of approximately 100 acres which, excluding the dwelling and other buildings, was under lease to petitioner for a term from April 1941 to the end of the summer of 1942, when the crop of fall wheat planted thereon would in normal course have been harvested (R. 33–34). Upon harvesting the wheat, petitioner by his own admission would have been obligated by the terms of the lease to sow the farm in grass (R. 33, 170). However, because of the taking petitioner lost the benefit of his lease and was unable to harvest his wheat (R. 44). The Gov-

ernment and the owner of the fee arrived at a settlement as to the value of the entire farm, exclusive of petitioner's leasehold interest (R. 36, 229), so that with respect to this tract the only issue left in the condemnation proceeding was the amount of just compensation payable to petitioner for the taking of his leasehold interest.

During November and December 1942, under Pennsylvania law,[1] a Board of View held hearings to determine the value of the leasehold (R. 35, 37) and on January 27, 1943, reported a finding of damages in the amount of $3,400 (R. 39), from which finding petitioner appealed (R. 41–42). At the jury trial which followed, no evidence was presented as to the market value of the leasehold as such on the date of taking, and petitioner proceeded to establish his claim in accordance with the prevalent rule of damages applicable in cases of tortious destruction of growing crops (R. 44–45, 212–213). Evidence was adduced tending to show that in the fall of 1941, petitioner had planted part of the farm in pure wheat and part in a mixture of wheat and rye (R. 56, 164), that the soil was of average fertility and had been carefully prepared (R. 68, 117, 120, 138), that a high-grade seed had been used (R. 102–103, 138, 164), and that the wheat was in good condition at the time of taking on March 23, 1942, (R. 68, 72, 92, 122, 141, 165). There also was testimony as to the esti-

[1] Purdon's Penna. Stats. Ann. 211.

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mated yield of wheat, mixed grain, and straw (R. 74–76, 101, 126, 145, 167) and as to the cost of harvesting and marketing the crops (R. 96–98, 127–130, 146–148, 167–170). However, the court refused to receive testimony as to the cost of sowing grass, on the ground that this requirement of the lease did not affect the value of the wheat (R. 171).

The harvest period for fall wheat in the locality extended from about July 4 to the first part of August (R. 99, 168), but it was an established custom for the farmers in the vicinity to hold their wheat for the higher winter prices rather than sell at harvest time (R. 104–105, 110, 129–130, 170). The average market price of wheat was $1.12 per bushel during July 1942 and $1.20 during August, while during January 1943 it was $1.51 (R. 156). There were similar variations in the prices of mixed grain and straw (R. 101, 149, 151–154, 158–159), the winter prices being approximately 30% greater than those at harvest. The Government objected to the admission of the January prices as going beyond the harvest period (R. 109, 130). The court overruled the objection on the theory that, since it was an established custom to hold wheat for the winter prices, petitioner would not be fairly compensated unless consideration were given to the market value at the time he would have sold his crop (R. 110, 131, 222). The jury was instructed that in computing the value of the crop they should use the

highest price between harvest time in 1942 and January 1943 (R. 207). The jury returned a verdict for $6,169.37 (R. 211) and the United States appealed (R. 224), assigning as errors the admission of testimony of January prices and the exclusion of testimony of the cost of sowing grass (R. 225).

The circuit court of appeals reversed, holding that, since the basic question was the value of the lease and since the value of crops was material only as it helped establish the value of the leasehold at the time of taking, any separate valuation of crops should be limited to the earliest time at which they would have a market value (R. 230–231). The court also held that the cost of sowing grass was relevant to the value of the lease and that this issue should be more fully developed at a new trial (R. 232).

ARGUMENT

1. When, as here, there are separate estates or interests in land taken by condemnation, the amount of just compensation should be determined as if the property were in a single ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *United States* v. *Dunnington,* 146 U. S. 338, 351; *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.). And the property should be valued as a unit, *i. e.,* as land as enhanced by the improvements thereon, without

separate appraisals of the elements, such as growing crops which may have bearing upon the unit valuation. *Morton Butler Timber Co.* v. *United States,* 91 F. (2d) 884, 888 (C. C. A. 6); *United States* v. *Meyer,* 113 F. (2d) 387, 397 (C. C. A. 7). However, here, because the valuation of the underlying fee exclusive of petitioner's interests had already been settled between the landowner and the Government, the sole issue which remained was the market value of petitioner's leasehold on March 23, 1942, the date of taking. *United States* v. *Miller,* 317 U. S. 369, 374. In the instant case, the chief item in the value of the lease was the worth of the growing wheat. But, nevertheless, the measure of just compensation would be determined by "what a willing buyer would pay in cash to a willing seller" for the leasehold interest as of the date of taking. *United States* v. *Miller, supra.* Petitioner is not entitled to be compensated for the growing crops as such, but only to the extent which the growing crops "enhanced the market value of the lease over and above the obligations of the lease." Cf. *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.).

In the absence of evidence as to the market value of the lease as such, it was necessary to resort to other means of proof. *United States* v. *Miller, supra.* Substantial justice was done by adopting the rule of tort law that, when growing crops are tortiously destroyed, the value of the

crops as of the date of destruction is determined after a consideration of the value of the potential yield at harvest time less the cost of further cultivation, harvesting, and marketing the crop. (See *United States Smelting Co.* v. *Sisam,* 191 Fed. 293 (C. C. A. 8); *United Verde Copper Co.* v. *Ralston,* 46 F. (2d) 1 (C. C. A. 9).)[2] However, since the worth of the crop at any time would be material only insofar as it helped establish the value of the leasehold at the time of taking, it would be erroneous to consider the crop prices in January 1943, six months after harvest and almost a year after the taking. The increase in value which would have accrued to petitioner by holding the crops for the higher winter prices would be nothing more than the profit resulting from a purely commercial transaction having only the remotest connection with the lease, which expired at harvest. It is true that because of the taking petitioner failed to make his expected profit. However, it was pointed out in *United States ex rel.*

[2] This theory of damages is in accord with the general rule that damages for the destruction of any legally protected interest are measured by the highest market value within a reasonable time after the time of destruction, the damages being the cost of replacement to avoid a loss or retain a profit. See 4 Restatement, Torts (1939), sec. 927, comment e. Petitioner's contention (Pet. 7) that January 1943, rather than harvest time, was the earliest time at which his wheat would have a market value is without merit. Although his wheat was of a particular quality, it was sold as No. 2 wheat (R. 103, 138, 156). Wheat of this quality was readily available at harvest time in the nearby Phailadelphia market (R. 156).

T. V. A. v. *Powelson,* 319 U. S. 266, 281–282, that there are numerous business losses which result from the condemnation of properties but which are not compensable under the Fifth Amendment, and that in the absence of a statute to the contrary the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See also *Omnia Co.* v. *United States,* 261 U. S. 502, 513. Thus, when the United States condemned this land, it did not incur the liability of compensation for the loss of profits which, but for the taking, would have been realized from the sale of crops growing thereon 2 Lewis, *Eminent Domain* (3d ed. 1909), sec. 724. The loss of profits was consequential damages for which there can be no recovery, since it was an unintended incident of the taking of land. Cf. *Mitchell* v. *United States,* 267 U. S. 341, 345.

Nor can petitioner's insistence that market prices in January 1943 must be considered be supported on equitable grounds. If the Government had requisitioned the wheat immediately after harvest, the amount of compensation would be the market value at that time. *United States* v. *Miller, supra; United States* v. *New River Collieries,* 262 U. S. 341. It would be unconscionable if the petitioner were permitted to receive a greater award for growing wheat still subject to the hazards of husbandry. And had petitioner desired to speculate on a possible increase in prices between harvest and his usual marketing

season, he could have acquired other comparable wheat in the Philadelphia grain market (R. 156).

Petitioner contends (Pet. 8–10) that unless the January 1943 prices are considered, he will not be compensated for the most profitable use to which the property taken could be put. Cf. *Boom Co.* v. *Patterson,* 98 U. S. 403; *McCandless* v. *United States,* 298 U. S. 342; *Olson* v. *United States,* 292 U. S. 246. This contention ignores the fact that it was a leasehold, and not growing crops as such, which was taken. The best and only available use of the leasehold interest was the raising and harvesting of a crop of wheat (R. 33). Since the lease expired in the summer of 1942, consideration of prices in January 1943 would result in compensation being paid for something more than the property taken. Cf. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326. Furthermore, although an owner is entitled to compensation estimated with reference to his property's market value for its best available use, he is not entitled to compensation measured by market value at a subsequent date. *Olson* v. *United States,* 292 U. S. 246, 255–256.

Petitioner asserts (Pet. 8) that he was prejudiced by the Third Circuit's analogy to principles developed in tort cases in various states. It is not seen how the reference to general state law could be error. Cf. *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349. In any event, the

analogy cannot be deemed prejudicial, since the court used the most liberal theory of damages applicable to growing crops.[3] Moreover, petitioner cannot now complain of this reasoning, for he relied upon the same analogy at the trial (R. 212–213).

2. By his own admission at the trial, petitioner was obligated to sow grass after the harvesting of the wheat crop (R. 170). A willing purchaser of the leasehold would take this obligation into consideration just as he would an obligation to turn over a part of the crop to the landlord. Therefore, the circuit court of appeals properly required that the existence of conditions bringing the obligation into effect and evidence as to the cost of sowing grass be developed at a new trial.

[3] The court did not adopt the law of Pennsylvania. If it had, petitioner would have been restricted to evidence of the value of the crops in the ground, without reference to prices of harvested crops, and his failure to produce such evidence would have been fatal to recovery. Cf. *Irwin* v. *Nolde*, 176 Pa. 594, 601; *Taylor* v. *Canton Township*, 30 Pa. Super Ct. 305, 311; *Andes* v. *Andes*, 114 Pa. Super. Ct. 165, 178–179; *Chesney* v. *Lehigh Valley Coal Co.*, 12 Pa. D. & C. 722, 723.

CONCLUSION

The decision below is correct and involves no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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